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Nos. 79-983 and 79-1689

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Appellant
vs.
HUBERT L. WILL, et al.,
Appellees.

On Appeals from the United States District Court for the Northern District of Illinois

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

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BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES[1]

INTEREST OF AMICUS CURIAE

The American Bar Association ("Association") has authorized the filing of the instant brief in support of appellees, addressed to the Government's contention that the Congress may enact legislation directly reducing the rates of compensation prescribed by statute for Article III judges, free from any Constitutional restriction, so long as such reductions cannot be shown to "discriminate against" Article III judges in purpose or effect or undermine their independence (Brief of Appellant, pp. 22, 60, 64 and n. 53;

[1]Pursuant to Rule 36(2) of the Rules of the Supreme Court, the written consents of the parties have been lodged with the Clerk of this Court.

see also, J.S., p. 3).[2] The interest of the Association in ensuring adequate rates of compensation, sufficient to attract to the bench and retain judges of the highest professional quality and integrity, is well known and of long standing.

In the Association's view, the Government's "discrimination" contention is contrary to the settled understanding of the meaning of the Compensation Clause. That contention, if accepted, would seriously, perhaps irreparably,

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[2]As to the other points in these cases, we note briefly:

(1) The Government's lengthy attempt to establish that the Acts withholding funds to pay increases in the judges' salaries were intended to enact "substantive" changes in the law is beside the point as far as Constitutional issues are concerned. If true, it would merely demonstrate that the Congress did, in fact, intend to diminish the judicial salaries prescribed by law.

(2) The Government's further contention that a judge's compensation, as provided by statutes in effect at the time he is serving or comes into office, may be decreased by the Congress at any time before the judge's salary is actually received is clearly without merit. A statute providing a salary for an Article III judge of X dollars plus a cost-of-living increase each year is no different in principle from a salary of X dollars plus $1,000 a year for each year of service. In each case the Congress cannot justify a reduction in the established salary during the judge's term of office by labeling the portion of the salary composed of the promised annual increases as mere "expectancies." The essence of the Compensation Clause of Article III is to provide a special protection for the future compensation of Article III judges which is not accorded to other Federal officers and employees, and to prohibit reductions in the rate of compensation promised to members of the Judiciary by statute. Here, although payments of the prescribed increases had not yet been received by the Judiciary, they had been statutorily prescribed, and it is any reduction of the rate of compensation "promised by law" that the Compensation Clause prohibits (*Evans* v. *Gore*, 253 U.S. 245, 254 (1920)) during the entire period of an Article III judge's tenure.

frustrate the purposes of the Constitutional protection, which are to ensure the independence of our Federal Judiciary and, of equal importance, to attract to and retain on the bench those "few men in the society" who "unite the requisite integrity with the requisite knowledge" for the proper discharge of the judicial function (The Federalist, No. 78, pp. 529-530 (Cooke Ed. 1961)).

These concerns have gained significance in light of the history of efforts to deal with judicial compensation in the past decade. From 1969 until 1975, Article III judges received no increases in their compensation despite increases of approximately 50% in the cost of living. This situation resulted not only in an unprecedented number of resignations from the bench, but also in increased difficulty in persuading qualified candidates to accept judicial appointments.

In 1975, the Congress enacted the Executive Salary Cost-of-Living Adjustment Act, Pub.L. 94-82, 89 Stat. 419, designed, among other things, to remedy the previous failure to accord judges necessary cost-of-living adjustments. That Act provided, for the first time, for annual adjustments in the rates of pay of the Judiciary, members of Congress, and certain high-level executive positions in an amount equal to the average of the annual adjustments accorded to General Schedule employees under 5 U.S.C. § 5305. Under the Act, Article III judges receive a stated compensation, "as adjusted by § 461 of" Title 28 (28 U.S.C. §§ 5, 44, 135). Section 461 of Title 28 provides that said adjustment shall be "equal to the percentage of such salary rate which corresponds to the overall average percentage of the adjustments in the rates of pay under [the General] Schedule."

Notwithstanding this statutory entitlement, the Congress has repeatedly refused to permit Article III judges to receive the statutory pay adjustments. Although the Judiciary did receive an approximate 5% increase effective October 1, 1975, for the fiscal year 1976, the corresponding adjustments due for the fiscal years 1977, 1978 and 1979 were not paid, because the Congress enacted legislation prohibiting the use of any funds to pay the increases to which the judges were entitled. And for the fiscal year 1980, the increase of approximately 12.9% that otherwise would have gone into effect on October 1, 1979, was reduced from 12.9% to 5.5%.

This failure to accord Article III judges the salaries to which they are otherwise entitled by express statutory provision goes to the heart of the purposes of the Compensation Clause. As was noted by Senator Hruska in the Senate debate on the appropriations restriction which precluded the use of funds to pay the fiscal year 1977 statutory increase:

> "Mr. President, we in the Congress have a heavy responsibility to maintain a high degree of quality and competence in our Federal judicial system. As a member of the Committee on the Judiciary I have been active in the confirmation hearings of hundreds of Federal Judges, nearly 300 in number in the last 7 years alone.
>
> "I have had occasion to consider the history and record of judicial nominees and to question these highly qualified and distinguished lawyers about their backgrounds and abilities for sitting on the Federal bench. I have been impressed with the success and

reputation that these men enjoy throughout the legal community and in their individual States and even nationwide. They generally come [to] the Federal bench, leaving successful and lucrative law practices. Most of them take significant income reductions when they accept appointment to the bench. It is well known that lawyers of the skill and experience we want on the Federal bench can command income far in excess of the current judicial salaries.

"If, however, we keep the salaries at their present levels, we can anticipate a reduction in the quality of our judges. We will get what we will be willing to pay for.

* * * *

"* * * Since November of 1973, eight judges with lifetime tenure have resigned, to return to private life, and some specifically stated that the reason for their decision was the freeze on salaries.

* * * *

"If it is the judgment of Congress that they do not want to face the responsibility of increasing their own salaries, that is fine. But we should confine our debate to congressional salaries and not seek to enlarge the company that is suffering misery" (122 Cong.Rec. 29133 (1976)).[3]

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[3]As pointed out by a recent commentator:

"The decline in the station in life and the prestige of federal judges thwarts one of the main goals of the Framers in establishing a federal judiciary: that of attracting the finest possible legal talent to serve on the bench" (Rosenn, The Constitutional Guarantee Against Diminution of Judicial Compensation, 24 UCLA L.Rev. 308, 336-337 (1976)).

SUMMARY OF ARGUMENT

The Government's novel contention that direct diminutions in judicial compensation are not prohibited by the Compensation Clause of Article III unless they can be proved to be a discriminatory attack on the Judiciary, is without support in history or authority. From the inception of the Constitution it has been the unquestioned understanding that such reductions do by their very nature carry with them an unacceptable potential for undermining judicial independence, as well as for subverting the permanence of judicial tenure guaranteed by Article III.

The Government's "discrimination" argument seriously underestimates the difficulty of assessing legislative motive in these cases. Moreover, the decisive issue so far as the purposes of the Compensation Clause are concerned is not whether the Congress can be demonstrated in fact to have acted with a discriminatory purpose, but whether a judge might curb his judicial independence in the fear that it had done or might do so.

In addition, the Government's argument ignores the necessity to isolate judges from political influences affecting their salaries. The basic reason for the failure to accord judges the statutorily promised cost-of-living increases during the four fiscal years in question has been political, arising from the fact that the members of Congress "linked" judicial salaries to their own, and felt unable for political reasons to vote themselves a pay increase. Such dependence on purely political considerations for the receipt of their prescribed compensation exposes Article III judges precisely to those influences

that it was the purpose of the Compensation Clause to prevent.

There is likewise no basis for the Government's reliance on decisions sustaining the imposition of nondiscriminatory income taxes, applicable to all citizens generally, on judicial salaries, or holding that the failure of the Congress to enact a statutory increase in the face of inflation does not in itself amount to a diminution in judicial compensation. As Justice Holmes explained in *Evans* v. *Gore*, 253 U.S. 245 (1920), although there is no reason "for exonerating [a judge] from the ordinary duties of a citizen," the Framers had "very good reason for preventing attempts to deal with a judge's salary *as such*" (253 U.S. at 265) (dissenting opinion) (emphasis supplied).

ARGUMENT

A. There is no support in history or authority for the assertion that only "discriminatory" diminutions in compensation are prohibited by the Compensation Clause.

In *Evans* v. *Gore*, 253 U.S. 245 (1920), this Court recognized that all legislative actions which "withhold or take from the judge *a part of that which has been promised by law for his services* must be regarded as within the prohibition" (253 U.S. at 254) (emphasis supplied).[4] Mani-

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[4]Although Justice Holmes' dissent in *Evans* is now generally accepted as a correct statement on the specific question of the validity of imposing a generally applicable income tax on judicial salaries, the Court's exposition of the background and purposes of the Clause enunciated "principles that continue to be valid" (*Atkins* v. *United States*, 556 F.2d 1028, 1043 (Ct.Cl. 1977)), as recognized by the Brief for the United States in this action (pp. 61, 67).

festly, this refers to a withholding of a prescribed statutory adjustment as well as to a reduction in the existing level of pay. As Hamilton explained in the Federalist, the decision to permit increases, but not decreases, in the compensation of the Judiciary was intended to "leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation" (The Federalist, No. 79, p. 532 (Cooke Ed. 1961)).

Notwithstanding these familiar and established principles, the Government, for the first time in its history, advances in these cases the contention that direct diminutions in judicial compensation are not prohibited by the Compensation Clause unless they can be shown (presumably by the judges) to be "a discriminatory attack on Article III judges * * * done with the purpose or effect of undermining their independence" (J.S., p. 3). Accompanying this novel contention is a suggestion that there is little danger that the independence of Article III judges will be undermined so long as salary diminutions do not "discriminate" against the Judiciary. This suggestion seriously underestimates the difficulty of assessing legislative purpose in cases such as these. Moreover, it ignores the necessity to isolate judges from political influences affecting their salaries, and it attempts to engraft a novel concept without support in history or authority which would completely undermine the Compensation Clause or

at least limit it to the narrowest possible compass, contrary to this Court's admonition that it should be interpreted "not restrictively, but in accord with its spirit and the principle on which it proceeds" (*Evans* v. *Gore*, supra, 253 U.S. at 253-254).

From the inception of the Constitution, it has been the uniform understanding both of the Congress and of this Court that all direct reductions in the judicial compensation prescribed by statute are prohibited, without any necessity for proof of discrimination against the Judiciary or that such legislation has the specific purpose or effect of undermining judicial independence. The Compensation Clause of Article III represents the determination of the Framers that such reductions *do by their very nature* carry with them an unacceptable potential for undermining judicial independence and, of equal importance, for subverting the permanence of judicial tenure by promoting judicial resignations and refusals of service. As a leading commentator pointed out, after comprehensive review of the cases:

> "Obviously, any direct reduction in the salary of a federal judge belonging to the courts which are authorized and therefore protected by Article III of the Constitution would be invalid, and none has been attempted. The principal constitutional issue arising out of the diminution clause has had to do with the propriety of applying a general income tax to judicial salaries * * *" (Fellman, The Diminution of Judicial Salaries, 24 Iowa L.Rev. 89, 93 (1938)).

It was pursuant to this uniform understanding that the Congress, when it became necessary in the Depression to adopt broad economy measures reducing the salaries of a

wide range of Federal employees, expressly exempted from an otherwise nondiscriminatory salary reduction "judges 'whose compensation may not, under the Constitution, be diminished during their continuance in office'" (*O'Donoghue* v. *United States*, 289 U.S. 516, 529 (1933), construing 47 Stat. 382, 402).

In subsequent legislation, the Congress attempted to apply such reductions to retired Federal judges on the assumption that they were not protected by the Clause (48 Stat. 283, 307). In *Booth* v. *United States*, 291 U.S. 339 (1934), this Court held, to the contrary, that a retired judge was protected by Article III of the Constitution, and further, in accordance with the Solicitor General's concession, that Article III protected a retired judge from a reduction in his salary below the level to which it had been increased following his appointment, even though the reduced level exceeded that in effect at the time he took office. As the salary reduction in question was part of a general nondiscriminatory economy measure necessitated by the extreme economic circumstances of the time, no such concession of unconstitutionality would have been tendered or accepted by the Court had there been any thought or understanding that the Compensation Clause prohibited only salary reductions discriminating against the Judiciary.

The understanding that the Compensation Clause prohibits *all* direct diminutions in judicial compensation, regardless of any evidence of discrimination against the Judiciary, is incorporated in the Executive Salary Cost-of-Living Adjustment Act itself. Because its provisions

for annual adjustments could produce salary decreases as well as salary increases, that Act specifies that the adjustments it prescribes

> "* * * shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office" (28 U.S.C. § 461).

The Government attempts to find support for its new construction of the Compensation Clause in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), which upheld the imposition of a generally applicable income tax to the salary of a judge appointed after the date of its enactment, and in the recent decision of the Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028 (Ct.Cl. 1977), certiorari denied, 434 U.S. 1009 (1978), refusing to hold that the Congress' failure to enact any salary increases for the Judiciary between 1969 and 1975 in and of itself violated the Compensation Clause because of the diminution in compensation that the judges had experienced as a result of the effects of inflation (Br. of Appellant, pp. 62-67). Neither *O'Malley* nor *Atkins* has any relevance to the issue presented here.

In *O'Malley* this Court made clear that its concern was not with any effort directly to reduce the compensation of the Judiciary, but solely with the question of whether it was a violation of the Clause to charge judges with one of "the common duties of citizenship" by imposing a generally applicable income tax on the salaries they had already received. The Court concluded that "[t]o subject them to a general tax is merely to recognize that judges

are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of government whose Constitution and laws they are charged with administering" (307 U.S. at 282).

In *Atkins*, the Court of Claims applied *O'Malley* to allegations that the effects of inflation alone imposed a duty on the Congress to enact a salary increase. As the court stated:

> "What *O'Malley* did add to the body of learning on the Clause was that nondiscriminatory actions of Congress, those affecting the public generally, though indirectly bringing about the lowering of judges' 'take-home pay,' would nevertheless pass muster under the Clause" (556 F.2d at 1045).

Further,

> "*O'Malley* rejected the contention that a diminution of purchasing power by virtue of income taxation violated the Compensation Clause, stating that [an] economic burden placed nondiscriminatorily upon the public generally afforded judges no cause to complain under the Constitution. Inflation generally experienced by the public is just such a nondiscriminatory burden" (556 F.2d at 1047).[5]

The instant case, however, does not involve an indirect reduction in judicial salaries as the result of the imposition of an income tax applicable to the public generally

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[5]The *Atkins* court did not, however, reject the contention that inflation could under some circumstances, if sufficiently severe, in and of itself impose a duty on the Congress to enact salary increases for the Judiciary: "Certainly, were Congress not to budge on the nominal dollar salaries it allowed judges in the face of hyperinflation, while the earnings of most others rose in rough

as one of the "common duties of citizenship," nor does it involve the scope of the Congressional duty in the first instance to enact salary increases for the Judiciary to take account of "inflation generally experienced by the public." Instead, it involves a direct diminution of the level of judicial compensation already statutorily prescribed. This reduction is not broadly applicable to the public in general, or even to the majority of Government employees, but is limited solely to members of Congress, the Judiciary, and a small number of high-level executive employees.[6] The Government's contention that Article III judges "too, are high-ranking public officeholders who should not be exempted • • • from the responsibilities and obligations [i.e., the pay cuts] that Congress • • • has imposed on all other leading government officials" (Br. of Appellant, p. 65) simply ignores the *special* Constitutional protection which the Framers explicitly provided for the compensation of the Judiciary, and not for that of other high-level officials.

When considering phenomena that were far removed from the concerns of the Framers, such as a generally

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parity with the cost of living, the threat to the ability of the judges to stay in their posts would be so great that a demand for their relief under article III would be difficult to refute" (556 F.2d at 1054). In view of the recent acceleration in the rate of inflation, and the continuing failure of the Congress to permit judicial salary increases, this situation hypothesized in *Atkins* is no longer remote from consideration.

[6]Even if the Government's discrimination contention were acceptable, it might still be questioned whether a decrease in salary applicable to this small group, but not to the great mass of Government employees generally (as in the *Booth* case), is nondiscriminatory, particularly since political considerations motivate predominantly in the small group.

applicable income tax, courts have quite properly been concerned to require some substantial showing that the practical impact of such general burdens of citizenship will frustrate the purposes of the Compensation Clause, for "[t]o require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge" (*Evans* v. *Gore*, supra, 253 U.S. at 265) (Holmes, J., dissenting). But the Framers had a different view of direct reductions in judicial salaries already prescribed by law: they concluded that such reductions have an obvious potential for deleterious impact both on the independence of the Judiciary and on the ability to attract persons of high quality to the bench and to maintain them there. When they enacted the Compensation Clause, the Framers chose to guard against these prospects by clearly condemning any diminution in the compensation promised to judges by law, whether accompanied by proof of discriminatory motive or not. Again, to quote Justice Holmes' dissent in *Evans*, while there is no reason "for exonerating [a judge] from the ordinary duties of a citizen," the Framers had "very good reason for preventing attempts to deal with a judge's salary *as such*" (253 U.S. at 265) (emphasis supplied).

B. A requirement of proof of "discrimination" or legislative purpose to attack judicial independence would frustrate the purposes of the Compensation Clause.

To confine the prohibition against diminution of judicial compensation solely to cases in which proof of actual discriminatory animus or legislative purpose to undermine judicial independence could be presented would deprive the

Compensation Clause of its force and disregard its broad protective purposes. Proof of legislative motive adverse to the Judiciary would be impossible in the ordinary case. For example, although the Government argues in the instant case that "there is no evidence whatever that the Acts were prompted by Congress' antagonism against the judiciary or its displeasure with any particular federal judges or judicial decisions" (Br. of Appellant, p. 64), it is interesting to note that Representative Udall, in advocating that the restriction on the use of fiscal year 1977 appropriations be extended to the Judiciary, argued on the floor of the House that any other position would mean that "it is lovely for the members of the appellate courts and the district courts, judges that some of my friends do not like because of their busing orders, it is great to give them a pay increase * * *" (122 Cong.Rec. 28873 (1976)).

The decisive issue is not whether the Congress can be demonstrated in fact to have acted with a discriminatory animus, but whether an Article III judge might curb his judicial independence in the fear that it had done or might do so. As this Court pointed out in *Evans* v. *Gore*, supra, the Compensation Clause guarantees that "the judge shall have a sure and continuing right to the compensation, whereon he may confidently rely for his support during his continuance in office, so that he need have *no apprehension* lest his situation in this regard * * * be changed to his disadvantage" (253 U.S. at 249) (emphasis sup-

plied). And in *O'Donoghue* v. *United States*, supra, this Court added:

> "The power to diminish the compensation of the federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support" (289 U.S. at 531).

Moreover, the Government's argument on "discrimination" ignores the actual facts that underlie these cases. The reason that Congress has attempted to prevent the use of funds to pay the statutory rates of pay to the Judiciary in the last four fiscal years has been fundamentally political. In recent years, the members of Congress have adhered to the theory that judicial salaries should be "linked" to their own. As the 1976 Report of the Commission on Executive, Legislative, and Judicial Salaries noted in recommending very substantial increases for the Federal Judiciary beyond those ultimately submitted to and approved by the Congress in 1977:

> "On September 22, 1976, Congress acted to deny a small upward salary adjustment to the top employees of all three branches of the Federal Government, an adjustment which reflected a percentage increase based upon a comparability study with the General Schedule and which would have occurred automatically had Congress not voted affirmatively to deny it" (Comm. Print No. 94-27, 94th Cong., 2d Sess., p. 12).

The Report observed that the members of Congress did not wish to deny themselves, Federal judges and high-level executives a pay raise, but

> "* * * they also knew, better than anyone else in government, the mood of America, and they knew that the consequences in November for any Congressman who voted himself a pay raise in September—however justified—would be paid at the ballot box" (id., p. 17).

The Report concluded that:

> "[t]here is no historic linkage among [Congressional and judicial salaries], and we cannot find a persuasive rationale for its rigid application. The basis since 1969 has apparently been largely political, based on the assumption that the Circuit Judges and the Level II executives might serve as a 'lifeline' to the Members of Congress, understandably unwilling to raise their own pay unilaterally. But as the public mood has intensified, the lifeline has disappeared, and it is Congress which has served as an anchor over the past eight years, dragging down the 'links' and preventing any increase anywhere" (id., p. 33).[7]

The concept of "linkage" as a means of setting judicial salaries, which has resulted in four successive Congressional failures to fund statutorily prescribed rates of pay for the Judiciary, has subjected the Judiciary to the same sorts of partisan and political considerations that

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[7]The Report continued that "[t]here are, in fact, sound reasons for unlinking Congress, Level II * * * and any of the Federal judges. Not only are these, of course, entirely different jobs with entirely different responsibilities, but the career anticipation patterns vary sharply. * * * The judge * * * has not made a decision to enter government for only a few years, and therefore, to accept

have prevented the members of Congress from increasing their own pay. "Linkage with congressional salaries exposes judicial salaries to the same fear of adverse voter reaction that Congress has about raising its own salaries during an inflationary period" (Rosenn, supra, 24 UCLA L.Rev. at 340, n. 127 (1976)). The entanglement in and dependence of the Judiciary on political considerations for the receipt of its prescribed compensation must inexorably undermine the very independence which it was the purpose of the Compensation Clause to ensure. As John Marshall once observed:

> "The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?" (quoted in *Evans* v. *Gore*, supra, 253 U.S. at 250).

And, at a later time, a noted student of our political system, subsequently the President of the United States, noted the indispensable requirement that the Judiciary be removed from the political arena:

> "Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. * * * It is clear

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a slightly lower salary for that period of service; but has on the contrary elected a permanent change, not only in earnings but in life style as well. If, as is customary, the judge is selected from those successful at the bar, the current assumption is that the trade-off for the judicial life, with the nonmonetary satisfactions it affords, is a heavy reduction in dollar earnings—for all of the remaining productive years. That factor alone suggests unlinking the two" (ibid.).

> beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some *non-political forum* in which those understandings can be impartially debated and determined. That forum our courts supply" (Wilson, Constitutional Government in the United States, quoted in *Evans* v. *Gore*, supra, 253 U.S. at 251) (emphasis supplied).[8]

The Government's restrictive reading of the Compensation Clause also overlooks the fact that ensuring judicial independence was not its only purpose. The protection it provides is also essential to attract to the bench and to retain the few persons in society of sufficient integrity,

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[8]Compare with these profound observations the nature of the considerations that have underlain the appropriations restrictions in the instant case. For example, in the debates on the fiscal year 1979 legislation, Representative Pattison of New York observed:

> "Make no mistake, I have no objection to saving the taxpayers' money and setting an inflation-fighting example. My concern is that we are doing the right thing for the wrong reason.
>
> "What we are seeing here today is not an analytical assessment of what should be the proper level of compensation for service in the Government. Nor is it a carefully measured blow aimed at the heart of the inflation problem, although it is not a bad first step. No, what we are witnessing today is a stampede, a mob of politicians fleeing for cover" (124 Cong.Rec. H5510 (daily ed. June 14, 1978)).

The New York Times editorial of November 19, 1976 observed:

> "Several factors account for this Congressional penny-pinching. On the part of some members there is a covert hostility to-

skill and wisdom properly to discharge the vital judicial function. As Hamilton pointed out in The Federalist:

> "There is a further and a weighty reason for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. • • • [T]here can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. • • • [A] temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity" (The Federalist, No. 78, supra, pp. 529-530; see also *Evans* v. *Gore,* supra, 253 U.S. at 253-254).

Even prior to the four successive recent Congressional salary restrictions, the failure of Congress for six years to enact any salary increases for the Judiciary caused Senator McGee to observe in 1975 that "the pay of Federal judges—men and women who stand as the central figure[s] in the administration of justice in this country—is encouraging more resignations now than at any

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ward Federal judges for what is deemed their excessive liberalism • • •.

• • • • •

"The strongest reason for Congress's Scrooge-like attitude, however, is a failure of political nerve. Members of Congress are reluctant to pay other Federal employees substantially more than they are paid themselves, and they lack the courage to vote themselves salary increases."

time in our history" (121 Cong.Rec. 25375 (1975); see also 120 Cong.Rec. 5095, 5104 (1974)). The recent attempted salary reductions have compounded this tendency. In 1976, the Quadrennial Salary Commission pointed out that "there are some facts worth keeping in mind on the growing importance of compensation (or rather the lack of increased compensation in a highly inflationary period) in accelerating departures from something even as prestigious and satisfying as the Federal bench" (Comm. Print No. 94-27, 94th Cong., 2d Sess., p. 39) and that "the strains of the past seven years are beginning to show" (id., p. 51; see also Rosenn, supra, 24 UCLA L.Rev. at 336-337 (1976)).[9]

It is one thing to hold, as in the *Atkins* case, that there is no obligation to increase compensation to levels not previously established because of the effects of inflation, at least absent a demonstration of "hyperinflation" or a "mass exodus" of judges from office (556 F.2d at 1054, 1055). It would be quite another to import into the Compensation Clause for the first time a requirement of a showing of discriminatory animus when the Congress acts to reduce judicial salaries previously established. Such refusals to pay the stated rates of judicial pay, if sustained, must

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[9]In his Message to Congress recommending the approximate 28% increase received by district judges in 1977 pursuant to the provisions of the Federal Salary Act of 1967, the President noted that the "Quadrennial Commission determined that a 50% increase in Executive, Legislative, and Judicial pay would have been justified by economic indicators," and that "as a result of frozen compensation schedules, a number of Federal Judges have left the bench to return to private law practice, and the Chief Justice has reported to me that others are planning to do so. This represents an alarming loss of talent and experience" (13 Weekly Comp. Pres.Docs. 50).

inevitably adversely affect those considering whether to accept a judicial appointment or to resign from the bench, for those decisions would be made with the knowledge that the Congress' express statutory provision for fixed adjustments in judicial compensation is an empty promise, subject always to overriding political considerations.

CONCLUSION

For the reasons stated, the judgments of the district court should be affirmed.

Respectfully submitted,

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